

**STATE OF DELAWARE**  
**DELAWARE PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>RED CLAY EDUCATION ASSOCIATION,</b>	)	
<b>DSEA/NEA,</b>	)	
<b>Charging Party,</b>	)	
	)	
<b>v.</b>	)	<b>DS/ULP No. 06-06-524</b>
	)	
<b>RED CLAY CONSOLIDATED SCHOOL</b>	)	
<b>DISTRICT,</b>	)	
	)	
<b>Respondent.</b>	)	

*APPEARANCES*

*For the Association: Jeffrey M. Taschner, Esquire*  
*Delaware State Education Association*

*For the District: Alfred J. D'Angelo, Esquire*  
*Buchanan Ingersoll & Rooney, PC*

**DECLARATORY STATEMENT**

**BACKGROUND**

The Red Clay Consolidated School District ("District") is a public school employer within the meaning of §4002 (n) of the Public School Employee Relations Act 14 Del.C. Chapter 40 ("Act" or "PSERA").

The Red Clay Education Association ("RCEA") is an employee organization within the meaning of §4002(h), of the PSERA and the exclusive representative of certain employees of the District under §4002(i) of the PSERA. The District and the Association

are parties to a collective bargaining agreement for the term September 1, 2005 through August 31, 2008.

The parties entered into a Stipulation of Facts, which provides, in relevant part:

4. On or about December 5, 2005, the District announced implementation of a dress code which applied, inter alia, to the employees represented by RCEA.
5. Assistant Superintendent Diane Dumont sent the code to Principals with a cover memorandum advising them to follow it and “any subsequent infraction should be dealt with through signed memo and disciplinary action.”
6. Thereafter, RCEA raised concerns and objections to the dress code.
7. Representatives of the District and of RCEA met on January 6, 2006 to discuss RCEA’s concerns.
8. The District agreed to address some but not all of RCEA’s concerns and issued a revised dress code, on or about January 30, 2006.
9. The Revised Dress Code has been in place since it was issued on or about January 30, 2006.
10. RCEA continued (and continues) to object to two (2) aspects of the Dress Code, namely:
  - (i) No denim; and
  - (ii) No sneakers except as set forth in the Dress Code.
11. The District and RCEA agree to the above stipulated facts solely for the purpose of submitting to the Executive Director the narrow issue of whether the Dress Code constitutes a mandatory subject of

bargaining. The parties each reserve the right to evidence other relevant facts should there be future proceedings concerning the issues raised in RCEA's pending ULP.

The initial Dress Code distributed by Assistant Superintendent Diane Dunmon to all Red Clay employees on or about December 5, 2005, provides:

The manner in which we dress contributes to the perceptions others form of this District. Your personal appearance can create a favorable or unfavorable impression on co-workers and the public. It is especially important for those of us who deal with the public as representatives of the Red Clay Consolidated School District to present a positive image. You are expected to maintain the highest standards of personal hygiene and come to work well-groomed.

A dress code has been established and listed below. All staff is expected to comply with the following dress code effective January 3, 2006, with the exception of transportation employees and maintenance and custodial staff.

Thank you for your cooperation with this directive.

#### Dress Code

Appropriate Attire Includes: Dresses, skirts, skorts, blouses, polo shirts, sweaters, jackets, pant suits, suits, blazers, dress slacks/khakis, shirt and tie, leather or suede shoes or dress sandals.\*

Inappropriate Attire Includes: Leggings, stretch pants, stirrup pants, spandex pants, denim jeans of any color, athletic wear such as sweat pants or sweat shirts, shorts, tank tops, bare midriffs, head wear of any type, leisure sandals (such as flip-flops) and sneakers.

\* Physical Education Teachers are an exception and may wear sweat suits and sneakers.

\*\*\* Red Clay ID tags are required to be worn in our schools at all times.

On or about December 5, 2005, Assistant Superintendent Dunmon also sent the following memorandum to all of the District's Principals:

Enclosed are copies of a District Memorandum which is to be given to every employee in your building. Should someone in your building violate this dress code, you should bring them in to review the code and direct them to follow it. Any subsequent infractions should be dealt with through signed memos and disciplinary action.

Please use your discretion when your school has special activities such as field trips and Field Day, but exceptions should be kept to a minimum. If you have questions or concerns please let me know

After discussions with RCEA representatives, the Dress Code was reissued in the following form:

The manner in which we dress contributes to the perceptions others form of this District. An individual's personal appearance can create a favorable or unfavorable impression on co-workers and the public. It is especially important for us, as representatives of the Red Clay Consolidated School District, to present a positive image. Everyone is expected to maintain the highest standards and to come to work well-groomed.

#### Dress Code

Appropriate Attire Includes: Dresses, skirts, skorts, blouses, polo shirts, sweaters, jackets, pant suits, suits, blazers, dress slacks/khakis, shirt and tie, leather or suede shoes or dress sandals.

- Principals have the flexibility to have Special Event days, such as Spirit Days or a Casual Dress Day. This does not mean wearing jeans every Friday. It means that if there is a Track and Field day or a field trip to a farm, for example, jeans may be more appropriate. This also includes such events as “pajama day” holidays and other similar specialty days.
- Staff may request permission to wear clothing that coincides with a particular unit they are teaching. For example, a unit on dinosaurs may include wearing a t-shirt that has a dinosaur on it. This must receive prior approval from the building administrator.
- Smocks or lab coats may be worn at the employee’s discretion when science, art or other projects are being done.
- On inservice days, staff may wear casual attire.

Inappropriate Attire Includes: Leggings, stretch pants, stirrup pants, spandex pants, denim jeans of any color, athletic wear such as sweat pants or sweat shirts, shorts, tank tops, t-shirts, bare midriffs, head wear of any type, leisure sandals (such as flip-flops) and sneakers.

- Physical Education Teachers are an exception and may wear shorts and a shirt with a collar (e.g. polo shirts), sweat suits and sneakers.
- Sneakers may be worn by teachers for playground duty.

\*\*\* Red Clay ID tags are required to be worn in our schools at all times.

Footnote: Most doctors’ notes have indicated that some employees need to wear “sneaker type shoes”. The need is for a soft shoe

usually with rubber soles. A list of options is being generated through contacts with the physicians in the area who deal with these foot problems. Some that have been suggested so far are Clarks, Rockport, Dansko and Easy Spirit. More suggestions will be shared when received. Typical gym sneakers are not acceptable footwear.

On June 2, 2006, the RCEA filed a Petition for Declaratory Statement and Unfair Labor Practice Charge requesting the Public Employment Relation Board (“PERB”) issue a Declaratory Statement as to whether the District’s dress code constitutes a mandatory subject of bargaining. If so, the RCEA argues the District’s unilateral implementation of the Dress Code constitutes a violation of §4007(a)(5), of the Act, in that the District refused to collectively bargain in good faith with the RCEA, the exclusive representative of the affected bargaining unit employees.

The District filed its Answer on June 29, 2006, which admits in part, and denies in part, the material allegations in the Complaint.

Under New Matter I, the District contends that rather than a “term and condition” of employment, the Dress Code is a statement of policy which falls within the penumbra of rights reserved to management in Article 10:10, of the collective bargaining agreement, which provides:

Except as limited by this Agreement, the Red Clay Consolidated School District Board, on its own behalf and on behalf of the citizens of the District hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Delaware and of the United States, and including the right to administer and supervise the schools of the District and will have

the authority to determine policy and adopt rules and regulations for the general administration and supervision of the schools of the District. Such administration, supervision, and policy will be conducted and formulated in accordance with Delaware law and the policies, rules, and regulations of State Board of Education. Additionally, nothing contained herein will be considered to deny or restrict the Board of its rights, responsibilities, and authorities provided by applicable law(s).

Under New Matter II, the District alleges that pursuant to Article 10, Section 10:10 and Article 2, Section 2.4, the “zipper clause” in the collective bargaining agreement, the RCEA expressly waived its right to collectively bargain over the dress code. Article 2, Section 2.4, provides:

This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the term of the Agreement, neither party will be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

Under New Matter III, the District alleges that this unfair labor practice charge is untimely and, therefore, void.

The Association’s Response denying the New Matter was received by the PERB on July 20, 2006.

At the request of the Executive Director the parties submitted briefs addressing the preliminary issue raised in the pleadings of whether the dress code qualifies as a mandatory subject of bargaining. Simultaneous opening briefs were filed by the

Association and the District on September 25, 2006 and September 27, 2006, respectively. Reply briefs were filed on October 10, 2006.

### **PRINCIPAL POSITIONS OF THE PARTIES**

District: The District first argues that the subject of a dress code is an “exclusive prerogative” of the District which, by application of §4002(r) <sup>1</sup> of the PSERA is an illegal subject of bargaining. Appoquinimink Education Association v. Board of Education of the Appoquinimink School District, Del. PERB ULP 1-3-84-3-2A, 43-44 I PERB 34 (1984).

The District maintains that §14 Del.C. §1049, Policy Making, reserves to the exclusive prerogative of the public school employer, “educational policies of the reorganized school district and the right to prescribe rules and regulations for the conduct and management of the schools . . . ” This grant of authority includes the right to promulgate a dress code for professional employees.

Alternatively, the District argues that pursuant to 14 Del.C. §4005, <sup>2</sup> the implementation of a dress code is an inherent managerial policy which is not a mandatory subject of bargaining.

Even if it is determined that the dress code qualifies as a term and condition of employment, where a specific subject qualifies as both an inherent managerial policy and

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<sup>1</sup> §4002(r): “Terms and conditions of employment” means matters concerning or related to wages, salaries, donated leave program(s) in compliance with Chapter 13 of this title, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public school employer.

<sup>2</sup> §4005: School employer rights. A public school employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public school employer, its standards of services, overall budget, utilization of technology, the organizational structure, curriculum, discipline and the selection and direction of personnel.



a term and condition of employment, the PERB has developed a balancing test to establish the bargaining status of such subjects. Appoquinimink Education Association v. Board of Education of Appoquinimink School District, supra. The application of the balancing test clearly weighs in favor of a determination that the implementation of a dress code is an inherent managerial prerogative and not a mandatory subject of bargaining.

RCEA: The RCEA maintains that neither the PSERA nor any other State statute reserves the right to establish and implement a dress code to the exclusive prerogative of the public school employer. General grants of authority, such as 14 Del.C. §1049 (cited by the District) are not sufficient to remove an otherwise mandatory subject of bargaining from the scope of bargaining. Woodbridge Education Association v. Board of Education of the Woodbridge School District, Del. PERB, ULP No. 90-02-048, I PERB 537, 546-47 (1980), and Appoquinimink Ed. Assn. supra.

The RCEA argues that neither does the dress code qualify as an inherent managerial prerogative. Even if it is determined that the dress code qualifies as both an inherent managerial policy and a term and condition of employment, the application of the balancing test requires a finding that its impact upon the individual teacher far outweighs the impact upon the operation of the school district, as a whole. As a result, the dress code constitutes a mandatory subject of bargaining.

### **ISSUE**

Whether the dress code unilaterally implemented by the Red Clay Consolidated School District constitutes a mandatory subject of bargaining?

## **DISCUSSION**

The PERB has adopted a balancing test to assist in determining whether a specific subject constitutes a term and condition of employment and, therefore, a mandatory subject of bargaining. Woodbridge Ed. Assn. supra.

The first step in the analysis is to determine whether the subject matter is expressly reserved to the exclusive prerogative of the public school employer by the PSERA or any other State statute. The PERB has held that parties, “are not free to bargain over matters determined to [be] statutorily reserved to the “exclusive prerogative of the public school employer.’ . . . Statutory prohibitions to be effective must be “explicit and definitive.” Woodbridge. supra.

The District cites no statutory provision which “explicitly and definitively” reserves to public school employers the exclusive prerogative to implement a dress code for its professional staff, as required by §4002(r) of the Act. 14 Del.C. §1049 contains a general reservation of authority for the class of subjects designated in sub-section (2), therein. In the absence of an explicit and definitive statutory grant of exclusive authority, there is no basis upon which to conclude that the dress code at issue here is reserved to the exclusive prerogative of the public school employer and, therefore, a prohibited (or illegal) subject of bargaining.

The second consideration is whether the subject matter falls within the statutory definition of “terms and conditions of employment.” Section 4002(r) of the PSERA broadly defines “terms and conditions of employment” as, “matters concerning or related to wages, salaries, donated leave program(s) in compliance with Chapter 13 of this Title,

hours, grievance procedures and working conditions.” To come within this definition, the Red Clay dress code must qualify as a working condition.

In Smyrna Educators’ Association v. Board of Education of the Smyrna School District, Del. PERB, DS No. 89-10-046, I PERB 475, 487-88 (1990), the PERB noted:

the term ‘working condition’ is somewhat narrower than a ‘condition of employment.’ A working condition is one which relates generally to the job itself, i.e., to circumstances involving the performance of the responsibilities for which one is compensated or the opportunity and qualifications necessary to perform work required of those employees who are members of the certified appropriate bargaining unit.

The District does not contest that the subject of a dress code impacts working conditions involving the performance of a teacher’s primary responsibilities.

The third consideration is whether the subject matter at issue involves a matter of inherent managerial policy as set forth in section 4005 of the PSERA. Section 4005, School Employer Rights, “does not constitute an express prohibition on matters of inherent managerial policy but rather allows the districts the license to choose those inherent policy matters it may wish to negotiate while legally refusing to negotiate the remainder.” Supra, at 45.

Many educational policy matters qualify as an inherent managerial policy while at the same time impacting upon the terms and conditions of the individual teacher’s terms and conditions of employment. The arguments of the parties concerning the application of the balancing test validate that such is the case here. It is, therefore, necessary to determine whether or not the dress code is or is not excluded from the duty to bargain.

To assist in this determination, the PERB established the following balancing test:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions, and also involves areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the school system as a whole. If its probable effect on the school system as a whole clearly outweighs the direct impact on the teachers, it shall be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable. Id.

After careful deliberation I conclude that the impact of the dress code on the school system as a whole does not outweigh its direct impact on the individual teachers.

The RCEA cites two primary decisions by the New York PERB involving the unilateral imposition of a dress code in the Caledonia-Mumford Central the Catskill Central School Districts.

In The Matter of Caledonia-Mumford Teachers Assn. NYSUT, AFT, AFL-CIO, and Caledonia-Mumford Central School District, Case No. U-12824 NY PERB, 25 PERB 4624 (1992), The New York PERB observed in finding for the Association:

The District asserts that the June 11 memo represents its compelling interest in ensuring that its faculty present a proper role model for the students with whom they come into contact. . . . No evidence was proffered to show that students had been adversely impacted by the style of dress adopted under the policy which had been in existence for eight years. The employees' interests lie in comfort,

convenience and cost, which have been found in similar circumstances to constitute terms and conditions of employment. [FN9]<sup>3</sup> I find that the evidence offered was inadequate to support the District's assertion that its interests outweigh those of the Association. Moreover, even if the District has a strong interest in regulating the conduct of its faculty while students are present . . . it clearly has a diminished interest in the apparel of its faculty where and when students are not present . . . the enforcement of the District's dress code . . . carries with it punitive consequences . . . In instances where punishment or penalties of any kind accompany a work rule, the balance will shift in favor of the employees' interest.

In The Matter Of Catskill Central School District, and Catskill Teachers Association New York State United Teachers, American Federation of Teachers, Case No. U-7828, NY PERB, 18 PERBV 4612 (1985), the New York PERB offered the following comments in support of its decision finding the imposition of a formal dress code impacted the employees more than the District:

With the imposition of the code, teachers must now take time to consider their attire when dressing for work, and must adhere to it throughout the work day, notwithstanding possible discomfort and inconvenience . . . it is reasonable to assume that teachers will also have to bear the cost of purchasing, maintaining and replacing clothing which conforms to the new standard. This intrusion into the teachers' personal time, comfort and sense of style is akin to grooming standards, which the Board has suggested concerns terms and conditions of employment. [9]<sup>4</sup>

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<sup>3</sup>Footnote 9 in the Caledonia decision references the second case cited by the RC EA, Catskill Central School District, for further analysis of the employees'

<sup>4</sup> F N 9: City of Buffalo, 15 PERB §3027 (1982, aff'g. 14 PERB §4646 (1981)).

. . . [T]he change from an element in a guideline to a detailed list of permissible and prohibited attire with disciplinary implications, constitutes such a significant alteration that it amounts to a new work rule. Thus, as the instant dress code involves cost, convenience, comfort and discipline, I find that it has more than a “slight impact” upon terms and conditions of employment . . . [A] teacher’s mode of dress . . . is but one of many factors, including conduct, which contributes to a teacher’s effectiveness as a positive role model. Doubtless helpful to the accomplishment of the District’s educational mission, the dress code would appear to relate more to how a teacher teaches than what his to be taught. Thus, while a teacher’s attire may reflect his own sense of professional responsibility, the dress code does not have the “major impact upon managerial responsibilities” . . . as to outweigh the direct and immediate interest the Association has in bargaining the subject.

The underlying material facts in the New York decisions parallel those in the present matter. Prior to the imposition of the formal dress code no specific dress requirements existed. Each case involves the unilateral imposition of a formal dress code prohibiting the wearing of certain attire and specifying other attire which is permissible. No specific circumstances were alleged to justify the unilateral imposition of the dress code. Failure to comply with the dictates of the code could result in the assessment of discipline to the offending employee.

The New York PERB, one of the first state agencies to regulate state public sector labor law, has long been a recognized as a leading authority in the field. While the Caledonia and Catskill decisions do not have a precedential impact on the Delaware PERB, I do find them persuasive.

The New York PERB cases consider discipline as a factor in finding a dress code to be a term and condition of employment in each case. Discipline was identified as a factor by RCEA in the present case but discounted by the District based upon the Delaware PERB decision in RE: Seaford School District Drug and Alcohol Policy, II PERB 887,892 (1993), which held:

Section 4005 of the Act expressly identifies discipline to be a matter of inherent managerial policy about which a public school employer is not required to bargain. The PERB has no authority to conclude otherwise.

The RCEA has provided new evidence in this proceeding which leads me to reconsider the 1993 Seaford decision. The text of House Amendment 19 to House Substitute 1 for House Bill 557 (“HA 19”) stated:

Amend House Substitute No. 1 for House Bill 557 as amended by inserting after the word “structure” and before the word “and” on line 4, page 6 of the following:  
“curriculum, discipline”

#### SYNOPSIS

This Amendment further clarifies areas of policy the employer is not required to consider in collective bargaining.

RCEA also provided the transcript of the debate on the floor of the General Assembly relating to HA19:

Representative Roy: Request H.A. #19 be brought before the House.

This is just to help clarify where under 4005 under the public school employer’s rights, it just helps to clarify what is not negotiable, and one of them is curriculum and the

other one, discipline. This I think is some of the primary things that should be left to the school boards; it should not be a negotiable item at the bargaining table – the curriculum and *discipline of children in the school*. It think that's probably one of the prime reasons we elect our school board.

Representative Oberle: Again, I think the concern – it's not a real concern. I think those things were already limited in current law and what's proposed in H.S. 1 to H.B. 557, and if redundancy is what helps to get this vote passed, Sir, I urge its adoption.

Representative Roy: A voice vote, Mr. Speaker.

Speaker of the House: All those in favor of H.A. #19 t H.S. 1 for H.B. 557, please indicate by saying "Aye". Opposed "No". H.A. #19 to H.S. 1 for H.B. 57 is declared passed by the House. [*emphasis added*]

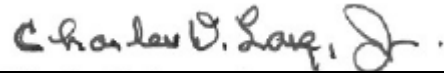
Neither the text of HA 19 nor the transcript of the floor debate was introduced into evidence in the Seaford case. Based upon this new evidence, RCEA's position that discipline as included in 14 Del.C. §4005, Public School Employer Rights, refers to the disciplining of students (rather than employee discipline) is compelling. This explanation and interpretation are also consistent with the other two statutes administered by the Delaware PERB and with decisions under the federal Labor Management Relations Act, on which the Delaware statutes are based.

For this reason, employee discipline is determined to be a mandatory subject of bargaining and the holding in Re: Seaford School District Drug and Alcohol Policy (Supra.) is reversed. This reversal lends further support to the conclusion that the dress code at issue in the instant petition is a mandatory subject of bargaining.



## **DECISION**

Consistent with the foregoing discussion it is determined that the dress code unilaterally implemented by the Red Clay School District constitutes a mandatory subject of bargaining.

A handwritten signature in dark ink, reading "Charles D. Long, Jr." with a stylized flourish at the end.

CHARLES D. LONG, JR., Executive Director  
Delaware Public Employment Relations Bd.

DATED: December 15, 2006